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In The

Supreme Court of the United States

October Term, 1980

WILLIE EARL PATTERSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether a one court indictment of conspiracy to violate 21 U.S.C. §841 may be expanded by the circuit court's reading in a charge of aiding and abetting.

2. Whether it is permissible to hold petitioner liable for conspiracy to violate 21 U.S.C. §841, by aiding and abetting the distribution of heroin without a showing of a particular sale of heroin.

3. Whether the petitioner can be convicted for an agreement to distribute uncontrolled substances to various heroin operations.

4. Whether a police officer may make an auto stop solely for the purpose of requiring the operator to produce identification without a showing of exigent circumstances.

5. Petitioner joins in all other arguments made by co-petitioners for granting certiorari.

STATEMENT PURSUANT TO RULE 21 (1 b) LISTING NAMES OF PARTIES BELOW

The parties to the proceeding in the court below were:

Leroy Perry, Leroy Butler, Charles Cameron, Donald Dewees, Arthur Gibbons, and Willie Earl Patterson, appellants; United States of America, appellee.

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To: The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner Willie Earl Patterson prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against him in the above-entitled case on February 2, 1981, and a petition for rehearing en banc denied May 13, 1981 (dissent as to petitioner Dewees).

OPINION BELOW

The opinion of the Second Circuit Court of Appeals is attached to the petition of petitioner-appellant Donald Dewees as Exhibit A. Petitioner Patterson relies on such opinion and makes references in this petition to the pages contained therein. The petitioner was convicted after trial for violating 18 U.S.C. §2; 21 U.S.C. §846 (conspiracy to violate the narcotics laws).

Petitioner Patterson along with other defendants and possibly petitioners Leroy Perry, Arthur Gibbons, Charles Cameron, Donald Dewees and Leroy Butler, were tried and convicted in the Eastern District of New York (Mishler, J.) and sentenced to various terms of imprisonment of from probation to fifteen years. The petitioner had been released on bail pending his appeal to the Second Circuit Court of Appeals. A motion for a stay of the mandate and for bail pending certiorari to the Supreme Court of the United States was submitted on May 19, 1981, and was denied June 1, 1981. Petitioner Patterson surrendered as directed on June 18, 1981, and is presently confined in the federal detention facility in New York City.

The court below split 2-1 in its reasons for affirmance. The majority held petitioner and the other appellants were properly convicted under 21 U.S.C. §846 for conspiring to violate 21 U.S.C. §841 by aiding and abetting the distribution of heroin.

JURISDICTION

The judgment of the Court of Appeals was entered on May 13, 1981, and the jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and 28 U.S.C. §1254(1) on the ground that the review by the Supreme Court by writ of certiorari is sought of a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory provisions involved are: 18 U.S.C. §2; 21 U.S.C. §841; 21 U.S.C. §846.

The constitutional provision involved is United States Constitution, Fourth Amendment.

STATEMENT OF THE CASE

The above petitioner, with several others, was arrested in 1979 and charged with conspiracy to violate 21 U.S.C. §841. A chief government witness, Gerald Gewirtz, testified as to four deliveries of mannite or quinine to Patterson between June 17, 1976 and November 11, 1976.

Several police officers testified as to Patterson having the boxes of mannite in his car after the first delivery and requiring Patterson to stop his car and identify himself.

A police sergeant testified that he saw Patterson at a garage at the time Gewirtz made one of the other deliveries.

There was no showing of the disposition of any of the materials delivered by Gewirtz to Patterson.

There was other testimony that other conspirators (Dewees and Pollack) were seen at or in the vicinity of Patterson's store at 125th Street and 5th Avenue. Dewees owned a bicycle store a short distance away from Patterson's variety store.

Patterson's car was observed by a police officer parked near Butler's house in New Jersey.

Patterson testified that he knew Butler socially and had been at Butler's garage in Harlem.

Frank Lucas, another chief Government witness, testified that he did not know Patterson.

REASONS FOR GRANTING THE WRIT

I.

The majority holding below is based on a novel theory of the conspiracy statute, 21 U.S.C. §846, and conflicts with prior decisions of this Court and other circuit courts regarding this as well as other issues.

This Court should grant a writ of certiorari to review the novel opinion of the majority below which held that the petitioner and others were properly convicted under 21 U.S.C. §846 for conspiring to violate 21 U.S.C. §841 by aiding and abetting the distribution of heroin (Appendix, 2a).

Petitioner contends that conspiracy (21 U.S.C. §846) and aiding and abetting (18 U.S.C. § 2) are separate and distinct crimes, each requiring a reference to a substantive crime in order for a conviction under either section to stand.

Here, the majority has added a new element to the conspiracy as charged, holding that petitioner and others could conspire to "aid and abet" a crime by the knowing supply of a raw material necessary for the commission of that crime. Judge Oakes appropriately commented that "this was not the charge under the indictment or the instruction of the court."

Such holding is in conflict with *United States v. Krol*, 374 F. 2d 776 (7th Cir. 1967) where the Court held "aiding and

abetting the commission of a substantive offense is a crime different from a conspiracy to commit the same substantive offense."

In *Krol,* the indictment charged two counts, the first, that the defendant aided and abetted a substantive crime, and the second, that the defendant conspired to commit the same substantive crime. *Krol* held that the defendant's conviction under the aiding and abetting count was not inconsistent with a not guilty finding under the conspiracy count.

In *United States v. Townes,* 512 F. 2d 1057 (6th Cir. 1975), *cert. denied,* 423 U.S. 846, the Court held "Conspiracy to commit a crime with another and aiding and abetting in its substantive commission are distinct crimes."

In *Nye & Nissen v. United States,* 336 U.S. 613 (1946), the defendants were charged with one count of conspiracy and six substantive counts. The Court discussed the application of conspiracy as opposed to aiding and abetting another to commit a crime, and held:

> "Aiding and abetting has a broader application. It makes a defendant a principal when he consciously shares in any criminal act whether or not there is a conspiracy. . . . Aiding and abetting rests on a broader base; it states a rule of criminal responsibility for acts which one assists another in performing."

Again, in *Pereira v. United States,* 347 U.S. 1 (1954), the defendants were charged with conspiracy as well as two substantive counts. Aiding and abetting was held applicable to the substantive counts and distinguished from the conspiracy count. In both *Nye & Nissen* and *Periera,* the Supreme Court

had an opportunity to extend the "aiding and abetting" statute to conspiracy as well as substantive offenses. The Court chose not to do so and distinguished the application of "aiding and abetting" from conspiracy.

The majority below stated that there appears to be no reported cases involving a conspiracy to aid and abet violations of the drug laws (Appendix 10a). The petitioner contends that charges of conspiracy to commit a substantive crime and "aiding and abetting" a substantive crime are separate and distinct, each imposing an individual liability upon the offender. *United States v. Valencia*, 492 F. 2d 1071 (9th Cir. 1974).

The majority points out that it is not appropriate to impose conspiratorial liability on one who merely aids and abets a conspiracy. Apparently to avoid the consequences of such premise, they hold, 18 U.S.C. §2 is applicable to 21 U.S.C. §841 and not 21 U.S.C. §846.

18 U.S.C. §2 provides: "Whoever commits an offense against the United States or aids, abets, counsel, commands, induces or procures its commission, is punishable as a principal." Aiding and abetting as used in the statute, means to assist the perpetrator of a crime. *United States v. Williams*, 341 U.S. 58 (1951).

By definition a person can only be guilty of aiding and abetting the commission of an act which is a crime. The Second Circuit has held: "It is hornbook law that a defendant charged with aiding and abetting the commission of a crime by another cannot be convicted in the absence of proof that the crime was actually committed". *United States v. Raffin*, 613 F. 2d 408 (2nd Cir. 1979), *see also, Shuttlesworth v. Birmingham*, 373 U.S. 262 (1963).

In order to convict a defendant of aiding and abetting the commission of a crime, it is first essential that the Government demonstrate that the substantive crime has been committed. *United States v. Cades,* 495 F. 2d 1166 (3rd Cir. 1974).

Yet, the majority below held, "It is unnecessary to show that the conspiracy actually aided any particular sale of heroin since a conspiracy can be found though its object has not been achieved (Appendix 13a).

In addition, the majority's application of the aiding and abetting statute improperly treads upon other precedents which are also issues (the deficiency of the indictment, prejudicial spill-over of multiple conspiracies, and severance) which should be considered on this petition.

The *indictment* did not charge, nor did the jury instructions spell out in so many words, that petitioners could be found guilty of "conspiring to aid and abet" the distribution of heroin. Nor were those words mentioned by the prosecutor. The majority held the precise language is unimportant provided all the elements necessary to find a conspiracy to aid and abet were fairly put to the jury (Appendix 11a). Yet, the court below has held an indictment under 18 U.S.C. §2 must be accompanied by an indictment for a substantive offense. *United States v. Campbell,* 426 F. 2d 547 (2nd Cir. 1970).

The *indictment,* as construed by the majority, holding the appellant liable under 18 U.S.C. §2, failed to meet the elementary principle of criminal pleading, stating all the elements necessary to constitute the offense intended to be punished. *Russell v. United States,* 369 U.S. 749 (1962); *United States v. Tornabene,* 222 F. 2d 865 (3rd Cir. 1955).

The majority's position was the conspiracy here involved a single distribution network for legal uncontrolled substances

which were used as cutting agents for heroin. They held that the participants can be prosecuted for one conspiracy by virtue of their common source, their knowledge of one another's position in the network, and their intent that the uncontrolled substances would be used as cutting agents, despite the fact that the conspirators were simultaneously involved in different independent networks which distributed the illegal element, heroin (Appendix 2a).

This position contravenes this Court's holding in *Kotteakos v. United States,* 328 U.S. 750, 774 (1946) "that the dangers of transference of guilt from one to another across the line separating conspiracies are so great that no one really can say prejudice to substantial right has not taken place."

Judge Oakes disagreed with the majority's theory of conspiracy involving a common source of diluents and various narcotics networks. Significantly, Judge Oakes found at least two heroin operations and stated the question to be, whether the petitioner and others can be convicted for an agreement to distribute uncontrolled substances to various heroin operations (Appendix 14a).

While the court below held that the petitioner and others were not prejudiced by the admission against the other petitioners of highly damaging evidence including inculpatory statements and stipulations as well as the testimony on similar acts (Appendix 23a), the majority held, "That the appellants' object and intent was to aid the distribution of heroin through the distribution of diluents is evidenced by . . . the various stipulations (Cameron) or inculpatory statements (Dewees, Gibbons, Perry) relating to their knowledge and intent." (Appendix 13a).

And so, on the one hand the majority used the stipulations

and inculpatory statements to show the singularity of the diluent conspiracy, while at the same time, the court below contends that there was no prejudicial spillover. This is contrary to the holding of this Court in *Bruton v. United States*, 391 U.S. 123 (1968).

II.

The decision below failed to reach the question whether a police officer may make an auto stop solely for the purpose of requiring the operator to produce identification without a showing of exigent circumstances.

Petitioner Patterson contends that the auto stop and seizure and requirement by the uniformed police officers for Patterson to produce his license and registration was an unnecessary intrusion upon his Fourth Amendment rights.

Detective Casella testified that he and another officer, in civilian clothes and in an unmarked car, followed Patterson's Cadillac for approximately thirty blocks without difficulty. By a coincidence, a marked police car happened to pull alongside of his vehicle while Detective Casella was stopped in traffic. Detective Casella took this opportunity to ask the uniformed officers to require the operator of the Cadillac to produce his identification. Thereafter, Detective Casella had no trouble in following the Cadillac to its destination, several blocks away, and then later to Patterson's place of business, another ten blocks or so further.

Casella's only manifested intent was to check Patterson's identification. Absent exigent circumstances, no amount of probable cause can justify a warrantless search or seizure. *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971). Stopping an automobile and detaining its occupants, even if the stop is

brief and limited in purpose, is a seizure. *Delaware v. Prouse*, 440 U.S. 648 (1979).

In *Arkansas v. Sanders*, 442 U.S. 753 (1980), the court reviewed some of the principles applicable to the search of automobiles. The court found that while there are some exceptions to the warrant requirement, the burden is on those seeking the exception to show the need for it. Here, the Government failed to show any emergency or exigent circumstances to justify the warrantless seizure.

In Patterson's case there was no showing of any exigent circumstances. As Casella testified, the passing of the patrol car was a coincidence. A seizure should not depend upon such a coincidence.

Therefore, this Court should grant certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Second Circuit.

Respectfully submitted,

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